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27 February 2008

Clerk of the Committee
Commerce Select Committee
Select Committee Offices
Parliament Buildings
WELLINGTON

COMPANIES (MINORITY BUY-OUT RIGHTS) AMENDMENT BILL

I am pleased to present the Listed Companies Association Inc.'s (**LCA**) following submission on the Companies (Minority Buy-out Rights) Amendment Bill (**Bill**). The LCA is an independent and voluntary non-profit organisation established in 1981. Its members are NZSX, NZAX and NZDX listed companies. As at 1 March 2007, the LCA represented more than 70% of issuers by market capitalisation of listed companies in New Zealand. This submission is made by the Executive of the LCA and does not necessarily represent the individual views of all of the LCA's members.

General support for the Bill

The LCA is supportive of the overall proposals for law reform set out in the Bill. There is widespread support within the LCA for reform of the buy-back provisions and general support for the detailed reform contained in the Bill.

While recognising the desirability of the buy-back regime generally, the LCA are concerned to avoid potential misuse of, or gaming by use of, the buy-back provisions. At its simplest, the LCA notes that where a company is listed, a shareholder who objects to any proposed course of action can simply sell its shares without the need for recourse to a buy-back regime (although the LCA recognises that this is not always the case).

As the Bill recognises, the LCA considers there is a need for greater certainty of process and for the process to be expeditious. A common concern is the time it takes to resolve disputes and the cost involved with the minority buy-out process. One member noted that it took 15 months and cost over $1m to resolve a dispute that member was involved in. It is expected that the reform of the buy-back provisions contained in the Bill will reduce the time and the costs involved in the process.

We therefore wish to comment on several aspects of the Bill, and the buy-back provisions generally, being:

- providing some additional guidance around the application of the Court's powers pursuant to section 114(1)(c) of the Companies Act 1993, in order to reduce the risk of misuse and gaming;

- the use of arbitration to determine the value of shares; and

- when title passes pursuant to the proposed section 112C(1)(b) contained in clause 7 of the Bill.

Court's powers pursuant to section 114(1)(c) of the Companies Act

As noted, the LCA is concerned about the potential for misuse and gaming. The market generally recognises that this can occur in minority buy-out situations. The LCA considers that a sensible solution would be to include some additional guidance to the judiciary in the application of its power to exempt a company from the obligation to purchase shares pursuant to the buy back regime under section 114(1)(c) of the Companies Act.

Section 114(1)(c) provides that a Court can exempt a company from the obligation to purchase shares from a minority shareholder who has given notice under section 111 of the Companies Act where it would not be just and equitable to require the company to purchase the shares.

The LCA suggests the following matters should be specified as matters for the Court to take into account in making that determination:

- whether the minority shareholder has put itself in the position of holding the shares in question in order to take advantage of the scheme; and

- the ability of the shareholder to dispose of the shares on market for value.

Use of arbitration to determine the value of shares

The LCA submits that arbitration is an inappropriate process to determine the value of shares where a shareholder objects to the price nominated by the Board during a minority buy-out. A number of LCA members have been dissatisfied with the arbitration process.

Instead, the price of shares should be set by an independent expert who is experienced in company valuations. The use of an independent expert would be more efficient than an arbitration process, both in terms of time and cost. The expert could be appointed by an independent body (possibly the Takeovers Panel) upon request by either party, failing agreement between them within the stipulated period.

Members of the LCA have had experience with the expert determination process under Rule 58 of the Takeovers Code. The LCA understands that, generally, this process has been successfully used to determine values for the purposes of compulsory acquisition provisions of the Code.

Passing of title pursuant to proposed section 112C(1)(b)

The LCA submits that it is not appropriate for legal and beneficial title to remain with the minority shareholder, pending final resolution of the arbitrated price pursuant to the proposed section 112C(1)(b) contained in clause 7 of the Bill. It is more appropriate that the shareholder becomes a contingent creditor of the company, where relevant, in relation to any payment the arbitrator orders the company to pay to the shareholder, where the price determined exceeds the provisional price paid pursuant to the proposed section 112A(2)(a).

The legal and beneficial title to the shares should pass to the company on payment of the provisional price pursuant to the proposed section 112A(1)(b). It is inequitable that a minority shareholder continues to receive dividends and vote in relation to shares, when that shareholder has entered into an agreement to sell, and received a provisional payment for, those shares.

Drafting comment

As a general drafting comment, the LCA notes that the Explanatory Note to the Bill in the last bullet point on page 2 states that any purported disposition of the shares of the shareholder, except in favour of the company, will be of no effect *from the time of the provisional payment* for the shares.

This does not accord with clause 7 of the Bill, as the proposed new section 112C(2) states that purported dispositions of the legal title to, or the beneficial ownership of, a minority shareholder's shares (other than dispositions in favour of the company) shall have no effect *after a shareholder has given notice under section 111(1) requiring a company to purchase the shareholder's shares*.

This inconsistency is also noted in *Bills Digest No. 1575.*

We trust the above comments are helpful. If you have any queries in relation to these comments, please contact:

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